Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

No. 96-334

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

RANGER INSURANCE COMPANY, Petitioner

VERSUS

STATE OF LOUISIANA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

OPPOSITION OF THE STATE OF LOUISIANA TO PETITION BY RANGER INSURANCE COMPANY FOR WRIT OF CERTIORARI

ATTORNEYS FOR THE
STATE OF LOUISIANA
RICK BRYANT
DISTRICT ATTORNEY

PAUL P. REGGIE
ASSISTANT DISTRICT ATTORNEY
Post Office Box 3206
1020 Ryan Street
Lake Charles, LA 70602
(318) 437-3400

\bg0\supcourt\ranger.us

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT 4

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Mennonite Board of Missions v. Adams, 462 U.S. 799, 103 S.Ct. 2706, 77 L.Ed.2d 195 (1983) 5

Moreau v. Federal Energy Regulatory Commission, 982 F.2d 556 (D.C. Cir. 1993).....13

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) 5

State v. Batiste, 653 So.2d 127.....15

State v. Bercy, 628 So.2d 1323 (La. App. 3rd 1993), writ denied 634 So.2d 397 (La. 1994) 9

State v. Cole, 618 So.2d 4 (La. App. 3rd 1993) 9

State v. Rotramel, 670 So.2d 378 (La. App. 3 Cir. 1996) 9

State v. Roy, 666 So.2d 1124, 1127 (La. App. 3 Cir. 1995) 16

Fourteenth Amendment to the United States Constitution 4

21 U.S.C. § (a)-(1) and 841 (b)(1)(a).....1

La. R.S. 15:85 7

La. R.S. 40:967 (C) & (F) 1

La. C.Cr.P. art. 322 (E) 5

La. C.Cr.P. art. 344 6

The State of Louisiana respectfully submits the following brief in opposition to the petition for Writ of Certiorari filed by the petitioner, Ranger Insurance Company.

STATEMENT OF THE CASE

Jaime L. Gonzalez was arrested on September 18, 1991, for possession of cocaine over 400 grams, a violation of La. R.S. 40:967 (C) & (F). On September 28, 1991, Gonzalez executed a contract with a commercial surety, Ranger Insurance Company, to post a bail bond in the amount of $200,000 to secure his release from State's custody.

Thereafter, the State of Louisiana transferred the matter to the federal authorities for investigation. On June 12, 1992, a federal Grand Jury returned an indictment against Gonzalez charging him with a violation of 21 U.S.C. § (a)(1) and 841 (b)(1)(a). However, subsequent to this on July

16, 1992, the Grand Jury returned a Superseeding Indictment which, in effect, dismissed the previous indictment. The case was then returned to the State for prosecution.

On June 2, 1994, the Grand Jury for the Parish of Calcasieu indicted Gonzalez. Thereafter, on August 15, 1994, the State moved to set Gonzalez's arraignment for August 29, 1994. On August 16, 1994, the requisite notice was sent to the defendant, as well as the agent for Ranger Insurance Company informing them of the defendant's arraignment date. On August 29, 1994, the defendant, Gonzalez, failed to appear. At that time, the State continued the matter until September 2, 1994. Once again the defendant failed to appear.

On September 7, 1994, after being notified that the arraignment notice had been mailed to the defendant and surety on August 16, 1994, the court ordered a bench warrant and

a bond forfeiture. The Judgment of Bond Forfeiture was signed in chambers on September 8, 1994.

Approximately six months later on March 6, 1995, the surety, Ranger Insurance Company, filed a "Petition for Nullity of Judgment of Bond Forfeiture, and Motion for Discharge and Release of Surety" with the Fourteenth Judicial District Court for the Parish of Calcasieu. Ranger's petition and motion were denied by the district court on April 19, 1995. Thereafter, Ranger appealed to the Court of Appeal, Third Circuit for the State of Louisiana, who affirmed the prior determination of the district court. Ranger then filed a Writ of Certiorari with the Supreme Court for the State of Louisiana. Ranger's writ application was denied on May 31, 1996.

Petitioner now applies to this Honorable Court for a Writ of Certiorari. The State of

Louisiana opposes petitioner's writ application. In his application, petitioner alleges one reason for granting a Writ of Certiorari.

ARGUMENT

I. WHETHER THE PROCEDURE USED BY THE STATE OF LOUISIANA TO FORFEIT THE BAIL BOND IN THESE PROCEEDINGS VIOLATED THE DUE PROCESS RIGHTS OF THE SURETY ON THE BAIL BOND UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant, Ranger Insurance Company, contends that the forfeiture procedure utilized by the State of Louisiana does not meet the minimum due process notice requirements of the Fourteenth Amendment to the United States Constitution. The crux of appellant's argument is that since the State elected to forfeit the bond on a later date, then as a matter of due process, the surety should have been notified of the exact forfeiture date.

There is no question that the Due Process Clause contained in the Fourteenth Amendment

mandates that the parties whose rights are to be affected must be afforded the opportunity to be heard. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." Mennonite Board of Missions v. Adams, 462 U.S. 799, 103 S.Ct. 2706, 77 L.Ed.2d 195 (1983), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). For the foregoing reasons, appellee, the State of Louisiana, urges that procedural due process safeguards were fully satisfied in the present case.

La. C.Cr.P. art. 322 (E) provides that by signing a bail bond, the defendant and his surety waive any rights to notice, except the

notice provided for in La. C.Cr.P. art. 344 and La. R.S. 15:85.

La. C.Cr.P. art. 344 (B)(1) and (2) provide:

> (1) When a bail bond does not fix the appearance date, and the presence is required of a person who has been released on bail, the defendant and his personal surety or the commercial surety or the agent or bondsman who posted the bond for the commercial surety, shall be given written notice of the time, date, and place the principal is required to appear.
>
> (2) The notice may be delivered to the defendant and the personal surety or the commercial surety or the agent or bondsman who posted the bond for the commercial surety by an officer designated by the court, at least two days prior to the day set for the appearance; or this notice may be mailed by United States first class mail to the defendant and his personal surety or the commercial surety or the agent or bondsman who posted the bond for the commercial surety, at least three days prior to the day set for the appearance. The notice shall be mailed to the defendant and his personal surety or the commercial surety or the agent or bondsman who posted the

> bond for the commercial surety to the address designated pursuant to Article 322.

However, La. R.S. 15:85 provides the actual procedure for bond forfeitures. This section reads in part:

> All bonds taken to secure the appearance of any person before any court executed in the state of Louisiana shall be forfeited and collected as follows:
>
> (1) Failure to appear and answer. If at the time fixed for appearance the defendant fails to appear and answer when called, the judge, on motion of the prosecuting attorney, upon hearing of proper evidence including: the bail contract; the power of attorney if any; and the notice to the defendant and the surety as required by Article 344 of the Code of Criminal Procedure, shall immediately and forthwith issue a warrant for the arrest of the person failing to appear and order a judgment decreeing the forfeiture of the bond and against the defendant and his sureties in solido for the full amount of the bond.
>
> (2) Signing of the judgment of bond forfeiture. Following the defendant's failure to appear, the court shall sign a written judgment

of bond forfeiture.

(3) Notice of judgment.

(a) After entering the fact of the signing of the judgment of bond forfeiture in the court minutes, the clerk of court shall promptly mail notice of the signing of the judgment of bond forfeiture. The notice of the signing of the judgment shall be mailed by United States certified mail with return receipt to all the following:

(i) The defendant at the address designated pursuant to Code of Criminal Procedure Art. 322.

(ii) The personal sureties at the addresses designated pursuant to Code of Criminal Procedure Art. 322.

(iii) The agent or bondsman who posted the bond for the commercial sureties at the address designated pursuant to Code of Criminal Procedure Art. 322.

(iv) The commercial sureties at the addresses designated pursuant to Code of Criminal Procedure Art. 322. Notice to the commercial sureties shall include the power of attorney number used to execute the bond.

(b) After mailing the notice of the signing of the judgment of bond forfeiture, the clerk of court shall execute an affidavit of the mailing and place the affidavit and the return receipts in the record.

(c) Failure to mail proper notice of the signing of the

> judgment within sixty days after the defendant's failure to appear shall release the sureties of any and all obligations under the bond.

The notice requirement contemplated by La. R.S. 15:85 (1) is that the defendant and his surety be sent notice of the defendant's initial appearance as required by La. C.Cr.P. art. 344. The State is not required to send notice to the defendant and his surety of the subsequent bond forfeiture hearing.

In the recent case of State v. Rotramel, 670 So.2d 378 (La. App. 3 Cir. 1996), the court revisited the issues previously before it in State v. Cole, 618 So.2d 4 (La. App. 3rd 1993) and State v. Bercy, 628 So.2d 1323 (La. App. 3rd 1993), writ denied 634 So.2d 397 (La. 1994). In Rotramel, the court discussed at length the application of bond forfeiture proceedings as follows:

> While the prosecuting attorney has some discretion as to when he

may move for a bond forfeiture, it is not without the limitations as prescribed in La.R.S. 15:85. Upon moving for a bond forfeiture, the prosecuting attorney must present the necessary proof to the trial judge, who must immediately and forthwith issue the bond forfeiture. The trial judge must then sign a written judgment of bond forfeiture. Next, the clerk of court has to enter the signing of the judgment into the court minutes. The clerk must then promptly mail notice of the signing by certified mail, return receipt requested to the defendant and the agent or bondsman at the address shown on the bond and to the surety at the address listed on the power of attorney. Failure of the clerk of court to mail the proper notice to the parties within sixty days after the defendant's failure to appear releases the surety of its obligation under the bond agreement. The state, therefore, has a sixty day window from the defendant's non-appearance to fulfill the requirements of the statute. If the state does not meet these requirements, the surety is released from its obligation. Finally, the statute provides for the use of summary process by the surety to raise defenses and actions in nullity. La.R.S. 15:85(5). The bond forfeiture statute clearly provides specific

> procedures, with safeguards, that must be followed when the prosecuting attorney moves for a bond forfeiture after a criminal defendant fails to appear at the appointed time. Thus, the surety is provided with substantial constitutional due process.
>
> A clear reading of La.R.S. 15:85 reflects that the trial judge has no authority to render a bond forfeiture sua sponte. Further, there is no legislative mandate, nor jurisprudential authority that requires the state to move for a bond forfeiture at the time the defendant fails to appear.

State v. Rotramel, 670 So.2d 378 at 380, 381.

In the present case, although appellant alludes otherwise, there is notably no denial that Gonzalez and his surety, Ranger, were properly notified of the August 29, 1994, arraignment hearing. Gonzalez did not appear and a record was made of his absence from the proceedings. At that time, the State continued the matter until September 2, 1994, whereupon once again Gonzalez failed to appear.

On September 7, 1994, the State moved to

forfeit the bond and a hearing was held on that date at which time the evidence required by La. R.S. 15:85 was provided. Upon hearing the evidence, the trial judge ordered a bench warrant for Gonzalez and the bond forfeited. The Judgment of Bond Forfeiture was signed in chambers the next day on September 8, 1994. Subsequently, the judgment was recorded in the court minutes and thereafter notice of judgment was mailed to Ranger as required by La. R.S. 15:85.

Ranger urges that its procedural due process rights were hampered when it did not receive subsequent notice of the September 2, 1994, or September 7, 1994, hearing dates. However, this commercial surety was fully aware of the possible consequences of the defendant's failure to appear on August 29, 1994, and there is absolutely no indication that this surety or any of its agents attempted to attend the

arraignment hearing to set forth any possible defenses.

In Moreau v. Federal Energy Regulatory Commission, 982 F.2d 556 (D.C. Cir. 1993), the court, although recognizing that the purpose of notice is to inform the recipient that the matter in which his protected interests are at stake is pending, held that "....the Due Process Clause does not require notice where those claiming an entitlement to notice already knew the matters of which they might be notified." Moreau, supra, at 569. In this case there is no question that Ranger received notice of the August 29, 1994, arraignment date. Since the bond could have been forfeited on August 29, 1994, subsequent notice would not have apprised Ranger of any information it did not have upon receipt of the notification of the August 29, 1994, hearing date.

In brief, Ranger intimates that the State

conducted a "secret one-sided" determination of their property rights without issuing any notice. This is simply not the case. As indicated in appellant's brief, "This right to be heard has little reality or worth unless the interested party is informed that the matter is pending and can choose for itself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950).

After receiving notice of the August 29, 1994, arraignment date, Ranger could have attended this hearing and set forth any defenses it felt had merit. Ranger chose not to do so of their own free will. This had nothing to do with any sleight of hand by the State in order to advance its pecuniary interest as has been implied by Ranger.

The State of Louisiana did in fact give

the surety, Ranger Insurance Company, requisite notice, comporting with procedural due process standards when it notified defendant and his surety, Ranger, of the August 29, 1994, arraignment date. The proceedings held on September 7, 1994, were essentially the same proceedings which could have been held on August 29, 1994. Ranger was not prejudiced in the instant case when the State held the bond forfeiture hearing on September 7, 1994.

If the state, in its discretion, can move for forfeiture on the date of nonappearance without having to notify the surety of the fact that defendant failed to appear, the state likewise does not have to notify the surety of the defendant's nonappearance to move for forfeiture at a later date. In the interim period, the bond remains enforceable. State v. Batiste, 653 So.2d 127. Additionally, there is no requirement in either La.Code Crim.P. art.

344 or La.R.S. 15:85 that the state notify the surety of the bond forfeiture hearing date. State v. Roy, 666 So.2d 1124, 1127 (La. App. 3 Cir. 1995).

The State of Louisiana submits it has complied with all of the procedural due process requirements mandated by the Fourteenth Amendment to the United States Constitution. Appellant's writ application requesting that this Court grant certiorari should be denied since there has been no violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

Based upon the above and foregoing reasons, the State of Louisiana respectfully submits that there was no error in the ruling of the Louisiana Supreme Court. Therefore, the application for Writ of Certiorari filed on behalf of the petitioner, Ranger Insurance Company, should be denied by this Honorable Court.

Respectfully submitted,
ATTORNEYS FOR THE
STATE OF LOUISIANA
RICK BRYANT
DISTRICT ATTORNEY

PAUL P. REGGIE
ASSISTANT DISTRICT ATTORNEY
Post Office Box 3206
1020 Ryan Street
Lake Charles, LA 70602
(318) 437-3400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Opposition of the State of Louisiana to Petition by Ranger Insurance Company for Writ of Certiorari have been sent by certified mail, return receipt requested No. P 295 591 691 to William Noland, Counsel of Record, 2739 Tulane Avenue, P.O. Box 26183, New Orleans, LA 70186, (504) 822-3104 this _____ day of _____, 1996.

_____
PAUL P. REGGIE
Assistant District Attorney